

EX PARTE OR LATE FILED



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December 31, 1998

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DEC 31 1998

Ms. Magalie Roman Salas, Secretary  
Federal Communications Commission  
445 Twelfth Street, S. W. – Room TWB-204  
Washington, D. C. 20554

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

Re: Ex parte, CC Docket No. 98-147, Deployment of Wireline Services Offering  
Advanced Telecommunications Capability

Dear Ms. Roman Salas:

On Wednesday, December 30, 1998, Steven Garavito, James Bolin and the undersigned, of AT&T, met with Suzanne Tetrault of the Commission's Office of the General Counsel. The purpose of the meeting was to discuss AT&T's views regarding the Commission's separate affiliate proposal and the Commission's authority under section 3(25)(B) of the Communications Act to grant Bell Operating Companies what has been referred to as "targeted interLATA relief." During the course of the meeting I distributed the attached *ex parte* letter addressing the Commission's authority under section 3(25)(B) of the Communications Act and copies of two previously filed *ex parte* notices addressing LATA boundary modifications and the separate affiliate proposal.

Two copies of this Notice are being submitted to the Secretary of the FCC in accordance with Section 1.1206 (b) of the Commission's rules.

Sincerely,

ATTACHMENTS

cc: S. Tetrault

No. of Copies rec'd 0+1  
List ABCDE



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Ms. Magalie Roman Salas, Secretary  
Federal Communications Commission  
445 Twelfth Street, S. W. - Room TWB-204  
Washington, D. C. 20554

Re: CC Docket No. 98-147 -- Deployment of Wireline Services Offering Advanced Telecommunications Capability

Dear Ms. Roman Salas:

This letter responds to several issues raised in recent discussions AT&T has had with members of the Commission's staff regarding the Commission's authority under § 3(25)(B) of the Communications Act to grant Bell Operating Companies what has been referred to as "targeted interLATA relief." In particular, some of the RBOCs, such as Ameritech, have proposed in their comments on the pending NPRM in this docket that the Commission should establish new "data LATAs" that would encompass entire states that are today divided into multiple LATAs (or that otherwise would have geographic boundaries larger than current LATAs). According to these proposals, BOCs that have not met the requirements of § 271 would nonetheless be authorized, within these larger areas, to provide what are currently prohibited interLATA data services, provided they met certain minimal conditions, such as utilizing a separate affiliate.

Such relief would exceed the Commission's statutory authority, because it would represent an act of forbearance from the requirements of § 271 -- which § 10(d) of the Act expressly prohibits. These requests are merely an improper attempt to resurrect, through the back door of § 3(25)(B), the § 271 forbearance requests that the Commission correctly held were beyond its authority in its Memorandum Opinion and Order in the instant docket.<sup>1</sup> In that Order, the Commission expressly rejected attempts to recharacterize such relief as "boundary

<sup>1</sup> See Memorandum Opinion and Order, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, ¶¶ 69-79 ("*Advanced Telecommunications Services*").

modifications," holding that requests for "large-scale changes in LATA boundaries" were "functionally no different" from requests for prohibited forbearance from § 271.<sup>2</sup> The present proposals cannot be saved by claims that they are less "large-scale" than the proposals the Commission has already rejected. That is so for at least two independent reasons.

First, any such distinction, even if true, would be irrelevant. All of the present and past BOC proposals for interLATA relief for so-called "data" services share a common and dispositive flaw: they fundamentally misperceive the difference between the authority to establish or modify LATA boundaries under § 3(25)(B), which the Commission has, with the authority to forbear from particular requirements of § 271, which the Commission lacks. Section 3(25)(B) defines -- and gives the Commission some authority to redefine -- the geographical boundaries of LATAs. The regulatory consequences of those geographical boundaries, however, are the sole province of § 271. That section, as is well understood, prohibits the BOCs from providing within their regions landline telecommunications services that cross the boundaries established under § 3(25)(B), unless they first satisfy the competitive checklist and the other statutory prerequisites for interLATA relief. Section 10(d), moreover, expressly and unequivocally prohibits the Commission from forbearing from applying the requirements of § 271 unless (as no one claims has yet occurred) those requirements have been "fully implemented."

Accordingly, while the Commission can engage in some degree of "redrawing the map lines" under § 3(25)(B), it cannot revise the statutory requirements that *apply* to those lines under § 271. Thus, for example, because § 271's prohibitions apply equally to "data" and voice services,<sup>3</sup> the Commission cannot say that a LATA boundary that exists for voice services (whether a LATA boundary that was established under the MFJ or one that was subsequently established or modified by the Commission) can be disregarded for data services. Similarly, because the competitive checklist may not be "limit[ed]" by the Commission,<sup>4</sup> and because those requirements and the others imposed by § 271 may not be the subject of forbearance,<sup>5</sup> the Commission may not decide that satisfaction of some lesser portion of those requirements will suffice to enable a BOC to provide service across certain LATA boundaries. Such action would not be a boundary "modification" or "establishment" under § 3(25)(B), but rather a prohibited attempt to rewrite § 271 by substituting a new regulatory scheme governing when BOCs may provide interLATA service. Each of the BOC proposals is unlawful for that reason.

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<sup>2</sup> *Id.*, ¶¶ 80-82.

<sup>3</sup> *See Advanced Telecommunications Services*, ¶¶ 35-37.

<sup>4</sup> *See* 47 U.S.C. § 271(d)(4).

<sup>5</sup> *See* 47 U.S.C. § 160(d).

This analysis is confirmed by the very authorities on which the BOCs seek to rely. Bell Atlantic's comments, for example, claim (at p. 5 n.2) that "[m]odifications of LATA boundaries were granted under the MFJ for specified purposes, particularly to make possible the speedier deployment of new telecommunications services or increased competition," and argue that the Commission here would be exercising the same type of authority. But the cases Bell Atlantic cites were not "boundary modification" decisions. To the contrary, they were decisions in which Judge Greene granted partial *waivers* of the MFJ's interexchange restriction -- precisely the authority that the Commission is precluded from exercising under § 10(d). Thus, for example, when the MFJ Court authorized the BOCs to provide cellular services in certain areas across LATA boundaries, it made clear that the granting of such relief required that the BOCs first meet the MFJ's stringent standard for "removal" of the decree's line-of-business restrictions.<sup>6</sup> Moreover, the Court made clear that, when such waivers were granted, the LATA lines remained unchanged -- for the Court's decisions stated that the BOCs would be prohibited from constructing or owning the interLATA links themselves, and instead were required to lease any transport across LATAs from interexchange carriers.<sup>7</sup> Thus, the Court in those decisions was not modifying LATA boundaries (the authority the Commission may exercise under § 3(25)(B)), but rather was waiving the prohibition against providing certain services across certain of those boundaries (the authority the Commission is precluded from exercising by § 10(d)).

Second, even the Commission's authority simply to "establish" or "modify" LATA boundaries -- *i.e.*, to redraw lines *without* purporting to dictate new regulatory requirements for how those lines would affect the rights of the BOCs -- is limited by § 10(d). That section "limits the manner in which the Commission may exercise its sole and exclusive authority to approve the establishment of or modification to LATA boundaries" and does not sanction "the piecemeal dismantling of the LATAs."<sup>8</sup> Thus, for example, the Commission correctly held that establishing a single "global LATA," as Ameritech previously requested, would exceed its authority because such action would "effectively eviscerate" §§ 10(d) and 271.<sup>9</sup> The broad interLATA relief the BOCs have requested would be unlawful under this second ground as well.

In particular, the principal distinction on which the BOCs rely in suggesting that the relief they seek would be "limited" -- a purported distinction between "data" and "voice" services -- is unsustainable. If the BOCs were provided with relief for so-called "data" traffic,

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<sup>6</sup> See *United States v. Western Elec. Co.*, 578 F. Supp. 643, 649-650 (D.D.C. 1983).

<sup>7</sup> See *id.* at 650 n.28, 651-652.

<sup>8</sup> Order, *Petition for Declaratory Ruling Regarding U S WEST Petitions to Consolidate LATAs in Minnesota and Arizona*, 12 FCC Rcd. 4738, 4751, 4752 (1997).

<sup>9</sup> *Advanced Telecommunications Capability*, ¶¶ 80-82.





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December 9, 1998 **RECEIVED**

DEC - 9 1998

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

Ms. Magalie Roman Salas  
Secretary  
Federal Communications Commission  
445 Twelfth Street, SW, Room TWB-204  
Washington, D.C. 20554

Re: Ex Parte Meeting, CC Docket No. 98-147, Deployment of Wireline Services  
Offering Advanced Telecommunications Capability

Dear Ms. Roman Salas:

On Tuesday, December 8, 1998, Leonard Cali, James Bolin, Michael Pfau, and I, of AT&T, met with Larry Strickling, Chief of the Common Carrier Bureau, Carol Matthey, Chief of the Policy Division, and Jordan Goldstein, Attorney for the Policy Division. During this meeting we discussed AT&T's views on the Commission's separate affiliate proposal and AT&T's proposed draft rules on collocation and loop unbundling.

Two copies of this Notice are being submitted to the Secretary of the FCC in accordance with Section 1.1206(a)(2) of the Commission's rules.

Sincerely,

Attachments

cc: Larry Strickling  
Carol Matthey  
Jordan Goldstein

## **Separate affiliate**

- Infirm as a matter of law
- Infirm as a matter of policy

## **Collocation**

- Minimum national guidelines and rules will foster entry
- Expand collocation options
- Require nondiscrimination, monitor performance

## **Loop unbundling**

- Basic loop (voice and analog data services)
- xDSL capable loop
- xDSL equipped loop

## Separate Affiliate Proposal

**The NPRM's "data affiliate" proposal is contrary to the 1996 Act, and would exceed the authority granted the Commission by Congress.**

- Congress imposed specific requirements on ILECs in § 251(c), and expressly exempted that section from the Commission's otherwise broad forbearance powers under § 10.
- There is no relevant legal distinction between POTS and advanced services -- both are subject to § 251(c) and to § 10.
  - Advanced services carry voice as well as "data."
- The NPRM's proposal would short-circuit the regime Congress established by effectively using the § 272 requirements as a template for granting forbearance from § 251(c).
- Congress wrote the § 272 separate affiliate safeguards to apply in clearly defined circumstances: to BOCs that have met the § 271 requirements for in-region interLATA relief.
  - Section 272 seeks to limit BOCs' ability to abuse their remaining market power after they have satisfied § 271.
  - Nothing in § 272 suggests that section suffices to confer non-ILEC status on ILEC affiliates.
  - Section 272(a)(1)(A) does not support the NPRM's proposal. If anything, that section makes clear that that an affiliate that complies with § 272 does not thereby escape § 251(c). (See attachment).
- Congress provided criteria for determining "ILEC" status in § 251(h). No reasonable interpretation of that section, or of the Act as a whole, could conclude that the proposed "data affiliates" can escape regulation as incumbent LECs.



## Separate Affiliate Proposal

The NPRM's "data affiliate" proposal is contrary to the 1996 Act, and would exceed the authority granted the Commission by Congress.

- The NPRM posits that proposed affiliate would be "truly separate" from the ILEC, and therefore not subject to § 251(c). In fact, affiliate would simply be the ILEC's alter ego.
  - Affiliate would be wholly-owned by ILEC, and therefore have no legally enforceable duty to act other than in the interest of ILEC.
  - Proposal would permit ILEC alter ego to operate in ILEC territory, using ILEC brand, but without protections Congress enacted in § 251(c).
  - If ILEC is permitted to transfer facilities to affiliate, then affiliate also would operate using the very network assets that § 251(c) now covers.
- The proposed requirements for disclosure of dealings between an ILEC and its wholly-owned affiliate do not alter ILEC's ability to control affiliate's operations.
  - Congress could have mandated "transparency" for ILEC operations in lieu of § 251(c). It did not do so.
  - In all events, the record before the Commission clearly shows that its § 272 rules have been ineffective. BOCs have openly refused to comply with existing § 272 disclosure requirements, and have engaged in numerous other violations.

## Separate Affiliate Proposal

Contrary to the argument that has been offered in this proceeding, § 272(a)(1)(A) does not support the NPRM's proposal. In fact, that section makes clear that an affiliate that complies with § 272 does not thereby escape § 251(c). Section 272(a)(1) provides that:

(1) In general.--A Bell operating company (including any affiliate) which is a local exchange carrier that is subject to the requirements of section 251(c) may not provide any service described in paragraph (2) unless it provides that service through one or more affiliates that--

(A) are separate from any operating company entity that is subject to the requirements of section 251(c); and

(B) meet the requirements of subsection (b).

If anything, this provision demonstrates that Congress understood that BOCs might try to evade the Act's requirements by creating subsidiaries, and intended that such subsidiaries would be treated as ILECs pursuant to 251(h). Section 272(a)(1) could simply have referred to "any BOC" -- particularly since the statutory definition of "Bell operating company" includes successors or assigns "that provide wireline telephone exchange service."<sup>1</sup> Instead, Congress invoked § 251(c), which applies not only to BOCs, but to all ILECs; and Congress therefore invoked the criteria of 251(h) in addition to § 3(4)'s more limited requirements for a carrier to be deemed a BOC. In § 272(a)(1), as elsewhere in the Act, Congress took pains to prevent ILECs from escaping the specific obligations it imposed on incumbents in § 251(c).

Section 272(a)(1)(A) nowhere states that a BOC affiliate that complies with § 272 is therefore not subject to § 251(c). Instead, that section provides that in order

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<sup>1</sup> 47 U.S.C. § 153(4)(B).

for a BOC affiliate to offer in-region interLATA services following Commission approval of the BOC's § 271 application for a given state, the affiliate must both (i) comply with § 272(b) and (ii) be sufficiently separate from the BOC (or from the BOC's ILEC affiliate) so as not to be subject to section 251(c) -- that is, the affiliate must not fall within § 251(h)'s definition of an "incumbent local exchange carrier." By its plain language, § 272(a)(1)(A) is a mandatory phrase, not a declaratory one. That section provides that in order to offer certain services, a § 272 affiliate "must not be an ILEC;" not that it "is not an ILEC" if it satisfies § 272(b).

The Commission therefore may not point to section 272(a)(1)(A) as evidence that an affiliate that complies with § 272 is a non-ILEC. To the contrary, that section charges the Commission with determining whether a BOC affiliate is sufficiently separate to be deemed a non-ILEC pursuant to § 251(h), in addition requiring that such an affiliate satisfy section 272(b).

## Collocation

**National guidelines and rules applicable to collocation are needed now to achieve the following:**

- Expand Collocation Options
- Expand Equipment Types That May Be Collocated and Limit Qualification Constraints
- Assure Nondiscrimination When Space Exhausts
- Provide for Specific Monitoring Collocation Performance

## Loop Unbundling

**Three separate loop configurations are necessary to support the development of competition.**

- Basic Loop: to permit competition in the local market for traditional voice only or analog data services
- xDSL Capable Loop: to permit competition for data or voice & data over a loop where conditions are conducive (loop length, intervening electronics & collocation)
- xDSL Equipped Loop: to permit competition for data or voice & data services over a loop where incumbent has offered service and/or condition inhibit delivery of a comparable service



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December 10, 1998

Ms. Magalie Róman Salas  
Secretary  
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445 Twelfth Street, SW, Room TWB-204  
Washington, D.C. 20554

RECEIVED  
DEC 11 1998  
FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

Re: Ex Parte Meeting, CC Docket No. 98-147, Deployment of Wireline Services  
Offering Advanced Telecommunications Capability

Dear Ms. Roman Salas:

On Wednesday, December 9, 1998, James Bolin and I, of AT&T, met with Carol Matthey and Jordan Goldstein of the Common Carrier Bureau's Policy and program Planning Division and Gregory Cooke of the Network Service Division. The purpose of this meeting was to discuss AT&T's views of the Commission's authority to modify or change LATA boundaries. AT&T's presentation here is consistent with its written comments in the above-referenced proceeding.

Two copies of this Notice are being submitted to the Secretary of the FCC in accordance with Section 1.1206(a)(2) of the Commission's rules.

Sincerely,

Attachments

cc: Carol Matthey  
Jordan Goldstein  
Gregory Cooke

CC Docket No. 98-147

Deployment of Wireline Services Offering Advanced Telecommunications Capability

## LATA Boundary Modifications

### *Section 10(d) expressly forecloses piecemeal interLATA relief through LATA boundary modifications or waivers*

As the Commission has found, § 706 is not a grant of additional powers, but merely directs the Commission to use “the authority established elsewhere in the Act” in support of advanced services.

Section 10(d) prohibits not only total forbearance from its requirements, but also partial or purportedly minor acts of forbearance.

Section 3(25)(B) provides only authority to make the types of administrative changes to LATAs made by the MFJ court.

- E.g., ELCS plans, ICO territory associations
- Minor modifications with minimal effect on interLATA competition

CC Docket No. 98-147  
Deployment of Wireline Services Offering Advanced Telecommunications Capability  
**LATA Boundary Modifications**

As the Commission has found, significantly altering or eliminating LATA boundaries would stifle RBOCs' incentives to open their local markets

Any attempt to limit LATA boundary modifications to provision of "data" services would be unworkable.

- *"Currently, 55 percent of our traffic is data," said Bell Atlantic Corp. Chairman Ray Smith. "In three to four years, 75 percent of our traffic will be data and 25 percent voice; it will be hard to tell one from the other when you consider voice over the internet."*

InternetWeek, March 2, 1998

There is no valid basis to permit RBOCs to provide what is currently interLATA transport.

- Interexchange market is highly competitive -- prices are close to cost
- No reason to believe RBOCs would have a cost advantage over IXC's -- unless they improperly subsidize advanced services or engage in discrimination
- Only existing RBOC interLATA links are their official services networks. These were built using local revenues and were not supposed to be used to compete in interexchange market

CC Docket No. 98-147  
Deployment of Wireline Services Offering Advanced Telecommunications Capability  
**LATA Boundary Modifications**

*There is no evidence that LATA modifications are needed -- or that RBOCs are willing to serve purportedly underserved areas*

The interexchange market is providing adequate capacity, even in the face of exploding demand -- and no RBOC has provided any reliable evidence to the contrary

Bell Atlantic's West Virginia petition is a warning, not an opportunity

- Unsupported allegations and anecdotes cannot provide a basis for LATA modifications
- Bell Atlantic continues to repeat its West Virginia claims both at the FCC and elsewhere, despite their utter lack of factual basis

US WEST conceded in congressional testimony that even with regulatory relief it would not give a "commitment" to a time frame for deployment.

- There is no reason to believe RBOCs' economics of serving rural areas differ from those of IXC's participating in competitive interLATA market.